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SUMMARY RECORD OF THE 569th MEETING

Held at the Vienna International Centre, Vienna,
on Wednesday, 17 May 1995, at 9.30 a.m.

Chairman: Mr. GOH (Singapore)

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The meeting was called to order at 9.35 a.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW *(continued)* (A/CN.9/406, A/CN.9/407, A/CN.9/409 and Add.1-4)

Article 9 (*continued*)

1. **The CHAIRMAN** said that although there had been overwhelming support for the new version of article 9 (1) (c), there seemed to have been some misunderstanding as to the decision taken on it. He understood that when the Working Group had drafted subparagraph (c), it had intended that only essential transmittal information should be retained, but that was not clear from the present drafting, in which the words "including, but not limited to, originator, addressee(s), and date and time of transmission" had been added merely as examples.

2. **Mr. MADRID** (Spain) said that he understood it had been agreed to amend subparagraph (c), but that it had not been made clear exactly how. He wished to be sure that subparagraph (c) would be amended so as not to require the retention of all additional transmittal information, since otherwise the question would have to be reopened.

3. **The CHAIRMAN** asked whether the members of the Commission considered it necessary that all the transmittal information associated with the data message should be retained, and if not, what was the minimum transmittal information that should be kept.

4. **Mr. SORIEUL** (Secretariat) observed that the question had been discussed at length in the Working Group. The main problem was to find a formulation that would not oblige the parties to retain all the transmittal information. There had been consensus in the Working Group that the problem in electronic transmission was that too much information was generated and that information to which no legal significance was attached did not need to be retained. The formulation adopted was intended to ensure that the essential information - originator, addressee, date and time of transmission - was kept, but it had now been pointed out that some systems did not contain all that information. If the Commission did decide that all the information attached to the message had to be kept, that would be a major departure from the decision of the Working Group.

5. **Mr. CHOUKRI SBAI** (Observer for Morocco) asked whether the indications "including, but not limited to, originator, addressee(s), and date and time of transmission" would be included in the Guide.

6. **Mr. ABASCAL ZAMORA** (Mexico) reiterated his previous position and drew attention to paragraph 69 of document A/CN.9/406, the third sentence of which read:

> "In addition, it was stated that a clear distinction should be drawn between those elements of transmittal information that were important for the identification of the message and the very few elements of transmittal information (e.g., communication protocols) which were of no value with regard to the data record and which, typically, would automatically be stripped out of an incoming EDI message by the receiving computer before the data record actually entered the information system of the addressee."

(*Mr. Abascal Zamora, Mexico*)

It would be quite contrary to the reasoning which had led to the proposed wording of subparagraph (c) if it were now decided to make it obligatory to retain all the information.

7. **Mr. GRIFFITH** (Australia) considered that article 9 (2) covered the point just made by the Mexican representative.

8. As to the point made by Mr. Sorieul about the Working Group's intention, the present drafting did in fact require the retention of all transmittal information, since the Working Group had been unable to identify the particular information that should be retained: the date and time might or might not be in the transmission, and an absolute obligation to keep date and time could therefore not be imposed. However, it seemed excessive to require the retention of all information even if it was immaterial. He therefore suggested that the information be qualified as "material", with an explanatory footnote in the Guide indicating that "material information" meant details of the originator, addressee, date and time of transmission, if that information was included.

9. **Mr. SORIEUL** (Secretariat) said that the statement by the Australian representative demonstrated that the present drafting of subparagraph (c) was not satisfactory. Because the wording was "transmittal information" and not "the transmittal information" it was possible to interpret the provision as not creating the obligation to retain all the information. However, it was probably unsatisfactory to base the interpretation on such an obscure distinction.

10. One solution would be to adopt the Australian representative's suggestion. The Working Group had in fact considered the possibility of qualifying the information as "material" or "relevant". Another solution would be to maintain the text and, in response to the United States objection, make it clear that there was an obligation to retain the details of originator, addressee, date and time of transmission only if the message contained that information.

11. **Mr. BURMAN** (United States of America) suggested that since there seemed to be consensus as to what was intended, the drafting group should be asked to produce a text for the provision and that some of the necessary information might be given in the Guide.

12. The drafting group might also consider a further slight modification to article 9 (2), to change "does not enter the information system of, or designated by, the addressee" to "is not normally retained" or "is not normally retained in processing". Normally, a system edited out certain transmittal information, so that the user did not see it. In e-mail, for instance, more information than normally accompanied paper-based transmissions was provided and, as the representative of Mexico had rightly pointed out, an obligation to keep it all might not be desirable. On the other hand, many users had adopted the practice of automatically keeping that information, because it allowed an audit mechanism well beyond what was possible in paper or fax transmissions. However, paragraph (2) was intended to provide a safeguard against having to keep unnecessary information. A reference to "material" information might perhaps be included in the Guide.

13. **The CHAIRMAN** suggested that the drafting group be requested to redraft the text to make it clear that only material information such as originator, addressee, time and date of transmission should be retained, with an explanation or a footnote that whatever items appeared in the system should be included.

14. **Mr. ABASCAL ZAMORA** (Mexico) agreed with that suggestion, but stressed that the fact that there was no obligation to keep any information that was not in the system should be made clear in the Model Law itself and not in a footnote.

15. **Mr. GRIFFITH** (Australia) wondered if the drafting group had the authority to deal with what was in fact a policy issue. It might be more appropriate to set up an ad hoc group of interested delegations to consider the matter.

16. In connection with the Chairman's suggestion, he proposed the following formulation for subparagraph (c): "material transmittal information associated with the data message is retained", with a footnote or another sentence on the following lines: "Material information is constituted by information as to originator, addressee, date and time of transmission and the like which is included in the message."

17. **Mr. ANDERSEN** (Observer for Denmark) agreed with the Mexican representative that the provision should be made clear in the Law itself, not in a footnote.

18. It would be unwise to settle precisely what the transmittal information associated with the data message was, because it would vary as new systems developed. He therefore proposed that the words "transmittal information associated with the data message" should be replaced by "information necessary to reproduce how the message was transmitted".

19. **The CHAIRMAN** suggested that an ad hoc group should be set up under the coordination of the representative of Australia to produce a revised subparagraph (c) which would require retention of the necessary information to identify the data message transmitted.

20. **Mr. SORIEUL** (Secretariat), replying to a question from Mr. Griffith (Australia), confirmed that the Danish proposal was not radically different from the Working Group's concept.

21. **Mr. MADRID** (Spain) suggested that a minimum requirement be established in order to identify the form in which the message was sent. Any restrictions leaving the door open to new technology should be dealt with as far as possible in a footnote.

22. His delegation would prefer article 9 (2) to be redrafted by replacing "... information which is transmitted for communication control purposes but which does not enter the information system" by "information which cannot be stored in the information system", since the information might well enter the system but not be retained there. In that connection the proposal made by the United States representative might be worth considering.

23. **Mr. CHOUKRI SBAI** (Observer for Morocco) considered that a word such as "basic", "essential", "substantial" or "fundamental" should be used rather than the word "material", which in some languages was not very clear.

24. **The CHAIRMAN** suggested that the observer for Morocco should join the ad hoc group to work out a suitable text.

25. **Mr. BOSSA** (Uganda) suggested that since paragraph (2) was closely linked to paragraph (1) (c), the ad hoc group should consider paragraph (2) as well.

26. **Mr. BURMAN** (United States of America), replying to a question from the Chairman, agreed that his proposal on paragraph (2) should be referred to the ad hoc working group.

27. **Mr. SORIEUL** (Secretariat) drew attention to a point that should be taken up by the drafting group. The reference in article 9 (3) to "the above conditions" was not really satisfactory in a legal text and a more explicit reference to the conditions should be formulated.

Article 10

28. **Mr. SORIEUL** (Secretariat), introducing the article (A/CN.9/406, annex), said that it would be useful if the Commission differentiated in its deliberations between the principle of contractual freedom, namely the extent to which parties could agree derogations to the Model Law, and the question which had been raised previously in connection with article 5, namely whether the Model Law should contain a rule of interpretation indicating how a contract was to be interpreted in cases where the parties had not specifically decided whether to use electronic data interchange (EDI) or a writing or other paper-based technique. They were two quite separate issues.

29. **Mr. ABASCAL ZAMORA** (Mexico) said that his Government had submitted a proposal (A/CN.9/409/Add.1) to the effect that article 10 be moved from chapter III to its original position in chapter I, so that the principle of party autonomy would apply to any provisions of the Model Law that dealt with situations involving agreements concluded between parties. When the earlier decision to move article 10 to chapter III had been taken, it had not been known whether the sphere of application of the Model Law would be confined to commercial matters. Now that such a limitation had been agreed upon, it was essential, in the interests of removing barriers to trade, that the Model Law should recognize parties' contractual freedom, which was the premise of all commercial law. Otherwise any clauses appearing in EDI communication agreements and defining terms such as writing would be automatically invalidated if they differed from the definitions contained in the Model Law. Concerns had been voiced regarding protection of the rights of third parties. As he saw it, those rights would not be infringed, since the contractual agreement would be binding solely upon the parties to it.

30. **Ms. BOSS** (United States of America), agreeing with the remarks of the representative of Mexico, said that, according to prevailing practice in her country, interchange agreements contained provisions that dealt with such concepts as writing, original and evidential value within the context of the parties' relationship; those parties alone were bound by their agreement and the rights of third parties were not involved at any stage. If article 10 remained in chapter III, parties' freedom to interpret those concepts would be restricted and a situation of uncertainty would be created in the field of electronic communications.

31. **Mr. SCHNEIDER** (Germany) said that his delegation strongly supported the idea of moving article 10 back to chapter I, for the reasons given by the representatives of Mexico and the United States of America.

32. **Mr. UCHIDA** (Japan) said that, as he understood it, the provisions of chapter II were not concerned with the effects of agreements concluded between parties, but with the application of existing legal requirements in a paper-based environment that could be obstacles to trade. The purpose of chapter II was to facilitate the use of EDI, and its provisions did not constitute default rules. It was completely impossible for parties to exclude certain legal requirements from their trade by their own agreement. Article 10 should therefore remain as it stood.

33. **Mr. BONELL** (Italy) said that his delegation felt that article 10 should be moved back to form part of the General Provisions. That would broaden its scope, but would not allow parties to derogate from well-established rules relating to certain legal acts. That was outside the scope of party autonomy. It would, however, enable parties to avail themselves of the Model Law while allowing them the option of excluding the EDI-equivalent approach and applying the traditional paper-based approach. The original draft wording of article 10, when appearing as article 5 in chapter I, had allowed for the possibility of exceptions.

34. **Mr. ALLEN** (United Kingdom), agreeing with the view expressed by the representative of Japan, said that the effect of chapter II had not been altered by the limitation of the sphere of application of the draft Model Law to the commercial field. Mandatory requirements, which were intended for the protection of third parties, particularly rules of evidence, applied also in that field. The principle of contractual freedom had not been affected, however. Parties were still fully at liberty within their own contractual relationship to state whether or not a writing meant the use of a data message, but they should not be permitted to alter provisions of national law adopted for reasons of public policy. The provisions contained in chapter II should consequently not be subject to variation by agreement.

35. **Mr. GRIFFITH** (Australia), agreeing with the representatives of Japan and the United Kingdom, said that if the provisions of article 10 were made to apply to the entire Model Law, parties might mistakenly assume that they had freedom to agree to derogate from rules of law. That was not possible. Parties could, however, by reference to the provisions of chapter II, rely on the terms of the Model Law as altering what would otherwise be the applicable rules of law, since a model law could override rules of law. Moreover, allowing variations to the legal requirements contained in chapter II could affect the rights of third parties. If, at the current stage of consideration of the text, the Commission adopted the approach now being suggested, that would fundamentally change the whole concept of the Model Law. His delegation therefore strongly opposed the proposal made by the representative of Mexico.

36. **Mr. MADRID** (Spain) said that if the representative of Mexico intended that article 10 should be moved to chapter I without any textual amendment, there could be no objection, since it constituted a general provision. If, however, the intention was to extend its applicability to chapter II, problems could arise, e.g. in cases where a State amended the scope of application of the Model Law to include other fields, as provided for in article 1. Extending the applicability of article 10 to chapter II would also allow parties to modify the concepts of a writing, original, signature, etc., despite the existence of a rule of law. That could not be contemplated. The principle of party autonomy would nevertheless be applicable within the framework of the parties' own contractual relationship, provided that third parties were not involved. The parties to the contract would then have complete freedom to decide how they understood such concepts.

37. **Ms. REMSU** (Observer for Canada) said that she agreed with the view that the principle of party autonomy should not apply to chapter II. That would enable parties to evade provisions relating to minimum requirements laid down in order to ensure compliance with rules of law. It could create a situation where parties would be able to derogate from certain rules of law in a paper-based environment, but not in an electronic environment. Also, the fact that the scope of application of the draft Model Law had been confined to the commercial sphere did not alter the purpose of the provisions contained in chapter II.

38. **Mr. MÄKELÄ** (Finland) said that his delegation wished to maintain the principle of media neutrality in order not to allow parties to circumvent the mandatory rules of law contained in chapter II by electing to use electronic forms of communication. He therefore supported the view of those delegations that wished to retain article 10 as it stood.

39. **Mr. BROQVIST** (Observer for Sweden) said that his delegation fully agreed with what the representative of Finland had just said.

40. **Mr. BISCHOFF** (Observer for Switzerland) said that his delegation supported the proposal made by the representative of Mexico. Party autonomy should be established as a fundamental principle, as in the UNCITRAL Model Law on International Credit Transfers. No rule should be excluded from the benefit of contractual freedom, and the Model Law should allow parties to vary its provisions by agreement. He did not feel it necessary to establish a rule of interpretation for contracts, even for those concluded under the Model Law. That should be left to the national law governing the underlying relationship.

41. **Mr. CAPRIOLI** (France) said that he also opposed changing the scope of application of article 10 to chapter II. The article should be kept in chapter III, even though the principle of autonomy of will was a basic principle. However, the purpose of chapter II was to eliminate obstacles in terms of validity, admissibility, writing, evidence, original, signature or storage. To provide for derogation from rules of law would inevitably reduce the substantive scope of such rules, which was why his delegation opposed making any changes to the article.

42. **Mr. ABASCAL ZAMORA** (Mexico) said that it was not the case, at least in his country, that parties in commercial relations could not make agreements on such matters as evidential weight and value. In matters of trade, that procedure was preferred in Mexico, and parties could come to an agreement on evidential weight that applied exclusively in the commercial area. Placing restrictions on agreements as to evidence might cause problems in international commercial arbitration. With regard to signature, contractual freedom was very important in the banking industry; there were many instances where what had traditionally been required to be done by means of a signature was now being done by other means. The same phenomenon was occurring on the stock exchange.

43. Although the Commission was saying that it wanted to make electronic communication more accessible and to facilitate and promote it, it was actually seeking to place restrictions on electronic communications which did not at present apply to paper communications. Article 10 was very clear: agreements were valid "as between parties". As such, they could not affect the rights of third parties. An example might be the granting of credit, where it was the general rule that the transaction had to be effected in writing. The parties involved might agree, however, that they considered an electronic transfer to constitute a writing, and that agreement would then be valid between them. But obviously, if a third party wanted to bar that credit, because the operation traditionally had to be carried out in writing, its position would not be affected by the agreement between the parties, and accordingly the credit would not have been granted for that third party. While the principle of the autonomy of will was recognized, the rule of commerce was that agreements between the parties could never affect the rights of third parties.

44. The representative of Spain had mentioned the possibility that a State might wish to extend the scope of application to non-commercial areas. That would be easy enough to do if the Guide pointed out that such a State would have to take account of the fact that it would probably be necessary to restrict in some way the principle of autonomy of will.

45. **Ms. BOSS** (United States of America) said that the main problem raised by those who opposed moving article 10 was that the requirements, particularly of chapter II, were seen as mandatory under their domestic law, and to the extent that they were mandatory under that law, there was quite understandably an objection to allowing the parties to vary them by agreement. On the other hand, there were countries such as the United States and Switzerland in which the requirements of chapter II were not mandatory but could be varied by agreement under the existing law.

46. The dilemma was that if article 10 applied solely to the provisions of chapter III, the result in some countries would be that the parties would lose their present ability to vary certain requirements by agreement. That was why her delegation had supported moving the article, which would have the effect of recognizing that the provisions of chapter II in many jurisdictions were non-mandatory and that therefore the ability to vary them by agreement should be recognized. At the same time, however, she was not suggesting that in those jurisdictions where such requirements were mandatory, they should now be variable by the agreement of the parties. A compromise was possible. If the main concern was the mandatory nature of those provisions under some countries' domestic law, the matter could be dealt with by an exception — for example, article 10 could say that, except to the extent that the requirements of chapter II were mandatory under domestic law, they might be varied by agreement. That would produce the desired result whether or not article 10 was left where it was.

47. **Mr. CHOUKRI SBAI** (Observer for Morocco) said he supported previous speakers as to the desirability of retaining article 10 in its present position, since it governed contractual relationships between the originator and the addressee. If it were moved to chapter II, on the other hand, that might nullify the effect of the Model Law. The representative of Mexico had been discussing general principles of commercial law which applied in all countries, but the subject under discussion was a different matter. Under the Model Law, information presented in a data message should be given due evidential weight. Could parties amend a rule of law which governed a writing, signature or original? The purpose of the Model Law was precisely to confer upon a data message a value or weight, and to move article 10 would create both a void and an ambiguity.

48. **Mr. ANDERSEN** (Observer for Denmark) said he also wished article 10 to be kept in its present position. The representative of the United States had proposed that special exceptions be made in chapter II to make its provisions subject to variation by agreement, but that was not necessary, because articles 5, 6 and 7 were already structured in such a way that legal systems wishing to make exceptions could do so. Legal systems such as those of the United States could bracket those provisions which could be varied by agreement, while others could confine the possibility to chapter III. Even if, under the rules of chapter II, a legal system did not bracket certain provisions as exceptions, the main provisions of the chapter already took into account the fact that there might be specific contractual arrangements between parties: article 6 (1) (b) referred to "any agreement", article 7 (2) (b) to "all the relevant circumstances" and article 7 (2) to "any other relevant factor". As to article 9, however, his delegation was afraid of making it subject to variation by agreement, because it dealt with an individual's obligation towards the public to retain data messages. If it were to be possible to make exceptions to that provision by agreement, it would not be clear whether the parties should be allowed to set aside a legal obligation under administrative law.

49. **Ms. ZHANG Yuejiao** (China) said that she was in favour of keeping article 10 in its present position, as that would not affect agreement between contractual parties. The draft under discussion was a Model Law, not a mandatory law, and therefore nations could make their own arrangements in accordance with their own national legal systems. Many countries had their own mandatory regulations regarding signatures on paper documents, and keeping chapter II as now drafted would enable the application of the Model Law to be as broad as possible.

50. **Mr. SCHNEIDER** (Germany) said that if article 10 was left in its present position, it could be read as a rule which stressed, but did not restrict, party autonomy. It was not at all clear whether it applied only to the provisions of chapter III. In supporting the proposals by Mexico and the United States of America, his delegation's intention was not to make domestic rules of law open to variation by party autonomy, but rather to open the principle of equivalence or media neutrality to party autonomy. That would mean that a domestic mandatory rule of law requiring a writing, signature or original would stand and that it would be only from the principle of media neutrality that the parties could agree to depart. For example, parties could state that the contract could be revoked only in writing and not by other means, such as e-mail, fax or EDI. There was no reason why they should not be able to do so. If article 10 were left where it stood, the parties would not be able to depart from the provisions of articles 5 and 9.

51. **Mr. VRELLIS** (Observer for Greece) said he had difficulty in understanding why the representative of Mexico was proposing to move article 10. Chapter II made a data message equivalent to writing, if a writing was required by a rule of national law. It was not a question of the mandatory nature of chapter II itself, but rather of the mandatory nature of the national law which required a writing. Where such national law existed, party autonomy was already limited: for example, parties could not decide to conclude their contract orally. What, then, did party autonomy mean? Perhaps the parties might say that if they used an electronic communication, they did not want their data messages to be made equivalent to a writing. They could choose not to use electronic communication, but if they did, he did not think their autonomy would really be restricted if they were told that in certain circumstances it would be regarded as equivalent to a writing.

52. **Mr. GRANDINO RODAS** (Brazil) said that for the reasons given by other speakers, his delegation favoured keeping article 10 in its present position.

53. **Mr. GRIFFITH** (Australia) said there was another reason beyond that cited by the observer for Denmark as to why there was no difficulty with respect to chapter II in those States where it was possible to derogate by agreement from a rule of law. References in chapter II themselves began with the phrase "Where a rule of law requires ...". If the rule of law was such that it could be derogated from by agreement of the parties, leaving the article in its present position would not affect the operation of the rule of law in those States, and those few States where there was such capacity for derogation would continue to be able to exercise that capacity and would not be affected by the mandatory operation of chapter II. The principle of derogation should be left where it stood in chapter III.

54. **The CHAIRMAN** said that the majority of the Commission's members seemed to favour keeping article 10 in its present position. However, a compromise could be considered, by adding a provision to the effect that in those States where a rule of law made it possible for the parties to derogate from the provisions in question, they would be able to do so.

55. **Mr. FARIDI ARAGHI** (Islamic Republic of Iran) said that his delegation thought the article should be kept in its present position but could support the proposal made by the representative of the United States of America.

56. **Mr. BONELL** (Italy) said that he had difficulty in understanding the position of those in favour of keeping article 10 where it was, since the opponents of the Mexican proposal had themselves stressed that parties were free to agree between themselves whatever they wished. The freedom to vary by agreement only applied "as between the parties", and the provisions in chapter II expressly allowed the possibility of derogation. As the representative of Germany had pointed out, the issue was not the rules of law referred to in articles 5, 6, 7 and 8, which were unaffected by the Model Law, but the use of an electronic form of writing, signature and so forth, in addition to a paper form. He could not see why parties should not be allowed to recognize their equivalence except in specific circumstances.

57. **Mr. BURMAN** (United States of America) agreed with the representative of Italy. The reason he had brought the question up was that to place article 10 in chapter III could be interpreted as limiting the power of the State to allow the flexibility built into articles 5, 6, 7 and possibly 8, in regard to party autonomy. It might be possible to incorporate a footnote to the effect that "States may extend the right of parties as between themselves to vary the provisions of chapter II".

58. **Mr. ALLEN** (United Kingdom) said that a provision along the lines suggested by the representative of the United States was entirely unnecessary, since it could not be said that the Model Law would affect the freedom of countries to allow parties to vary existing requirements of law. Articles 5 to 8 stated that requirements must be satisfied in a particular way. If articles 5 to 7 were not applicable because they had been lawfully disapplied, they would then become irrelevant.

59. **Mr. ABASCAL ZAMORA** (Mexico) considered that it would be unwise to bring out a Model Law concerning which there had not been enough time for thorough discussion. As UNCITRAL always tried to achieve a consensus through compromise, it might be necessary to spend more time on the drafting in order to avoid ending up with an unsatisfactory text that would not attract sufficient support in the various countries. The representative of Italy had correctly summed up his own attitude that the freedom between the parties had to be preserved. The Mexican delegation had never suggested that the parties should be able to derogate from mandatory provisions. In his view, it was simply a question of finding the most suitable wording.

60. **Mr. CHAY** (Singapore) agreed with the observations made by the representative of Italy. As he understood the matter, those opposing the proposal to move article 10 did so because they thought it would allow parties to contract out of established rules of domestic law. However, he failed to see how that could happen. If, for example, the parties contracted out of article 6, they would still need to satisfy domestic law requirements in regard to the signature.

61. **Mr. HERRMANN** (Secretary of the Commission) said that the views expressed regarding the interpretation of article 10 were much closer than would appear. The main problem seemed to concern the question of mandatory rules. As he understood it, the mandatory element referred to the minimum requirement. Parties could agree on stricter rules if they wished. On the subject of evidential value, in some countries the relevant provisions were non-mandatory, in others a matter of public policy, and in still others somewhere between. At all events, the Model Law could not change the mandatory character of domestic rules. In his view, the term "rule of law" would include non-mandatory provisions that had not been

(*Mr. Herrmann, Secretary of the Commission*)

derogated from and thus became mandatory. The Model Law offered a positive interpretation by allowing other means, providing certain conditions were met. Party autonomy must be subject to certain safeguards; an oral agreement could not be allowed, for example, but an agreement between the parties regarding certain details relating to EDI messages could be accepted. If delegates had different interpretations of what was intended, it might be necessary to clarify article 10 by means of a footnote or a comment in the Guide, but he thought that UNCITRAL should not get into the habit of using footnotes too often.

The meeting was suspended at 11.50 a.m. and resumed at 12.15 p.m.

62. **The CHAIRMAN** said that most representatives seemed to take the view that article 10 should remain where it was. He reminded the Commission that it had agreed not to alter decisions arrived at in the Working Group unless there was overwhelming support for a change. It appeared that those opposing the Mexican proposal were not against domestic legislation allowing party autonomy in regard to the provisions contained in chapter II. In response to the concern expressed by the representative of the United States that leaving article 10 where it was might be interpreted as meaning that the parties could not by agreement vary articles 6, 7 and 8, he suggested that a possible solution might be to add a new paragraph (2) to article 10 formulated as follows: "Nothing in this article shall be construed as preventing any variation of other rules as permitted under national law", or other wording to that effect.

63. **Mr. BONELL** (Italy) said he was entirely in agreement with the Secretary. He would accordingly suggest that article 10 be deleted as being unnecessary. In substance, both chapter II and chapter III already contained the possibility, where appropriate, of a different agreement between the parties, and where no such provision existed, it could be assumed that the parties could not derogate from the article concerned unless domestic law provided otherwise. In his view, whether article 10 were included or excluded, placed in its present position or elsewhere, would not change the situation in substance.

64. **Mr. ANDERSEN** (Observer for Denmark) proposed that it should be left to the Secretariat to reflect the consensus in the Commission in the Guide to the Model Law. As he understood it, the consensus reached was to the effect that variation by agreement could apply to certain aspects of certain provisions in chapter II. Regarding the proposal put forward by the representative of Italy, it was true that article 10 was redundant in relation to chapter III as well as to certain provisions of chapter II. But, from a structural point of view, such redundancy had become the style of the Model Law. It could, for example, be found also in article 4, in which a principle was stated that was subsequently established in following provisions. In his view, however, it was important to tell the reader of the Model Law that interchange agreements were needed when dealing with EDI.

65. **Mr. ABASCAL ZAMORA** (Mexico) said that there was a basic consensus in the Commission to the effect that party autonomy could be permitted so long as the contractual agreements did not infringe mandatory provisions. He suggested that the drafting group be asked to give effect, either by relocating the article or adding some new text, to that consensus, which should be clearly expressed in the law itself, not in the Guide or in a footnote.

66. **Mr. BURMAN** (United States of America) expressed his support for the Danish proposal and his opposition to the deletion of article 10, which would amount to a fundamental change.

67. **The CHAIRMAN** said that there were three proposals before the Commission. The first, by the representative of Italy, was to delete article 10 entirely, it being understood that, if that proposal was adopted, some consequential changes might be necessary to other articles in chapter III. The second, by the observer for Denmark, was to state in the Guide the consensus reached by the Commission in regard to article 10, which would remain as it was. The third, suggested by the representative of Mexico, was to ask the drafting group to see that article 10 reflected the consensus reached during the present discussion.

68. **Mr. ALLEN** (United Kingdom) said that the implications of the Danish proposal were unclear. The observer for Denmark had not explained what he thought the consensus reached by the Commission actually was.

69. **The CHAIRMAN** said that, according to the Danish proposal, article 10 would remain as it was and that the Guide would state that the parties to an agreement had autonomy to change the provisions in chapter II in so far as domestic legislation allowed them to do so.

70. **Mr. GRIFFITH** (Australia) considered the third option to be impossible. The drafting group could not be asked to resolve issues that the Commission had been unable to resolve itself. The Commission itself would have to deal with them.

71. **Mr. BONELL** (Italy) said he still found it difficult to understand the second option. In his view, the consensus in the Commission was that parties could derogate here and there from what was stated in the Model Law, which was intended to allow electronic means to be used for certain documents traditionally in paper-based forms. The Secretary had been right to assert that the differences in substance were not great, but if everything were referred to domestic law, the parties might even be allowed to exclude a rule of law imposing an agreement in writing. That would be unacceptable. As he saw it, the Commission was trying to come up with a uniform law in the form of a Model Law.

The meeting rose at 12.35 p.m.

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9 November 1995

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-eighth session

SUMMARY RECORD OF THE 570th MEETING

Held at the Vienna International Centre, Vienna,
on Wednesday, 17 May 1995, at 2 p.m.

Chairman: Mr. GOH (Singapore)

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Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within one week of the date of distribution of this document* to the Secretary of the Commission, room E0455, Vienna International Centre.

Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

V.95 59238 (E) (a:\1995\uncitral 2)

Distr.: 23 November 1995

The meeting was called to order at 2.10 p.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW *(continued)* (A/CN.9/406, A/CN.9/407, A/CN.9/409 and Add.1-4; A/CN.9/XXVIII/CRP.6, A/CN.9/XXVIII/CRP.7)

Article 10 (*continued*)

1. **The CHAIRMAN** reminded the Commission of the Italian proposal made at the previous meeting to delete article 10, which would require consequential changes in other articles in chapter III, and the proposal by Denmark to insert a provision in the Guide to the effect that the members of the Commission agreed that article 10 did not require States whose domestic legislation allowed parties to exclude the operation of any of the rules in chapter II to change their existing practice. There was also a proposal from Mexico, which he asked the representative of that country to clarify further.

2. **Mr. ABASCAL ZAMORA** (Mexico) said that there seemed to be general agreement that party autonomy should be permitted but that the right of parties to vary provisions by agreement could not extend to mandatory provisions of domestic law. Rather than the existing drafting group, perhaps a small ad hoc drafting group could be set up and asked to seek a form of words making it possible to implement that agreement.

3. **Mr. BONELL** (Italy) said he did not believe that deletion of article 10 would require any consequential changes.

4. Regarding the Danish proposal, what was being adopted was a Model Law and he saw little sense in stating in a separate document that States were free to adopt arrangements different from the provisions of article 10.

5. **Mr. SORIEUL** (Secretariat) said that, without wishing to prejudge any decision of an ad hoc drafting group, he would like to suggest that a second paragraph might be added to article 10 on the following lines: "Paragraph (1) of this article is not intended to deal with any rights of the parties to vary any rule outside the provisions of this chapter".

6. **Mr. BURMAN** (United States of America) and **Mr. ANDERSEN** (Observer for Denmark) welcomed that suggestion.

7. **The CHAIRMAN** suggested that the matter be referred to a small ad hoc group led by the United States delegation, to work out a new text along the lines just proposed.

8. *It was so agreed.*

Article 11

9. **Mr. SORIEUL** (Secretariat) said that the text of article 11 in the annex to document A/CN.9/406 had raised problems. The delegations of Australia, the United Kingdom and the United States had prepared a new draft of the article, appearing in document A/CN.9/XXVIII/CRP.7, which was now before the Commission. He wished only to mention in that regard that the term "reasonable notice" in the original English version of paragraph (4) of the proposal posed translation difficulties.

10. **Mr. GRIFFITH** (Australia) said that it might be slightly overstating the case to say that his delegation was one of the authors of the proposal, but he supported the text, which stated more positively and openly what had been the intention of the Working Group's text. However, paragraph (3) (a) (ii) of the new draft, which enabled the addressee absolutely to regard a message as that of the originator if that were reasonable in the circumstances, did raise the policy question whether it was appropriate to enable an addressee to regard a data message as being that of the originator as against an originator who might in fact have absolutely no connection with the message. It was true that paragraph (3) (b) provided for the liability of an originator in enabling a person to gain access to a method used to identify the message, which seemed to be a perfectly appropriate basis for the assignment of responsibility. But he would be interested to hear the views of other delegations on whether it was appropriate that a person be regarded as originator merely because the addressee could in the circumstances say that it was reasonable for him to apply a particular procedure.

11. **Ms. BOSS** (United States of America) agreed that that was an important policy issue. However, paragraph (3) (a) (ii) of the new draft had been included because there was a similar provision in the draft approved by the Working Group.

12. The purpose of the draft presented in document A/CN.9/XXVIII/CRP.7 was mainly to reorganize the substance of the former article 11. Paragraphs (1) and (2) were taken from the former paragraph (1) and merely restated what would be the outcome in nearly all jurisdictions — namely, that an originator was bound by the messages that he sent, and by the actions of his agents. Paragraph (3) consolidated what was said in two paragraphs of the Working Group's text. It dealt with three situations; the first was that in which an agreed security procedure was followed, and in that circumstance the addressee could regard the data message as being that of the originator. The phrase "an addressee is entitled to regard a data message as being that of the originator, and to act on that assumption" attempted to clarify the intention of the phrase in paragraph (3) of the Working Group's text containing the alternative "[deemed] [presumed]". The second situation was that where a message came from a person who had gained access to the system by reason of a relationship with the originator. The basic principle was that the sender of a message was responsible for adequate security regarding its system, so that the addressee of any message generated by such other person would be entitled to regard that message as being that of the originator. The third situation, which involved the point raised by the Australian delegation, was that in which the addressee used security procedures that were reasonable under the circumstances.

13. Paragraph (4) and its two subparagraphs stated that the addressee must not regard a message as coming from the originator if he knew or should have known that it came from elsewhere or had received reasonable notice to that effect. "Reasonable notice" meant that the addressee must have sufficient time to respond to such notification.

14. Paragraphs (5), (6) and (7) dealt with two situations, one in which there was an error in the message and one in which there was an erroneous duplicate message. Those paragraphs merely restated what had already been decided by the Working Group.

15. **Mr. ABASCAL ZAMORA** (Mexico) welcomed the proposed amendment submitted by the delegations of Australia, the United States and the United Kingdom and thanked the representative of the United States for her explanation.

(*Mr. Abascal Zamora, Mexico*)

16. He noted that it was customary procedure, especially in EDI, for there to be a prior agreement between the parties about the manner in which the authenticity of a message could be verified, which was covered by paragraph (3) (a) (i). However, it had been noted in the Working Group that there were open EDI systems and it was increasingly common that messages could be received from persons with whom there had been no previous agreement on identification procedures. It was therefore necessary to find a solution to that problem. The procedure followed in his country was to take as a basis the Model Law on International Credit Transfers, in which the assumption was accepted that messages could well come from persons with whom no communication protocol had been previously agreed. He therefore favoured the retention of paragraph (3) (a) (ii).

17. **Mr. CHOUKRI SBAI** (Observer for Morocco) welcomed the proposed amendment of article 11 as being clearer than the original text. He agreed with the remark of the Secretariat regarding the term "reasonable notice". Perhaps the wording "received notice within a reasonable time period" or "... reasonably timely notice" could be used.

18. **Mr. SCHNEIDER** (Germany) welcomed the proposed amendment to article 11 but thought that the policy behind paragraph (3) (a) (ii) was not at all convincing. To take an example, if a person's name was used as that of the originator, it would be very difficult to prove the facts if an addressee received a falsified data message. He opposed acceptance of paragraph (3) (a) (ii).

19. **Mr. BONELL** (Italy) said he took it, on the basis of the definition in article 2 (a) of the Working Group's draft, that data messages also included telegrams and telexes. If that was the case, what were the implications of paragraph (3) of the proposed new text for article 11 in respect of telegrams? Was the receiver of a telegram entitled to consider it as emanating from the apparent sender only if he had applied a procedure previously agreed between him and that sender?

20. With respect to EDI, he found it difficult to understand paragraphs (4) to (7) of the proposed new text. They dealt basically with errors in transmission of messages, and that involved contract law. In the new text, there were really three similar situations that were dealt with differently: the case in which there was some question as to whether the message was to be regarded as from the originator; the case of an error in the content of the message; and the case of duplication. In the first of those cases, the proposal would entitle an originator at any time to give notice in order to disown and nullify a message. That was a new concept that caused him concern. He would welcome clarification.

21. **Mr. ANDERSEN** (Observer for Denmark) said that one of the reasons why a new law was needed was that electronic communications, unlike telegrams which were delivered by a single postal service, had no fixed framework: they could be transmitted between two individuals with computers. There was thus need to rewrite many of the assumptions underlying the law governing traditional communications, and that was not an easy process. He found the proposed new text of article 11 well drafted, but was concerned that the revised paragraph (6) seemed to have moved away from the original provision that the recipient would be entitled to act on an erroneous message only if he had no reasonable knowledge of the error.

22. **Mr. MADRID** (Spain) shared the view of the Mexican representative that the concept of using a reasonable procedure to determine whether a message originated from a given person should be retained, since it reflected existing practice. Paragraph (3) (a) (ii) should be considered in conjunction with paragraph (4) (b), which provided that if the addressee knew, or should have known, that the message was not that of the originator, paragraph (3) (a) (ii) did not apply.

23. He suggested that a further limitation should be introduced in paragraph (4) (a) by an addition along the following lines: "unless the addressee proves the contrary". The issue should be seen as linked to article 12 concerning acknowledgement of receipt.

24. **Mr. BURMAN** (United States of America) said the issue now under consideration had been discussed at great length in the Working Group, and the Group's conclusions had been made known to successive plenary sessions of the Commission. In his view, it was inappropriate at the present stage to try to return to basic issues, such as why the Model Law should be covering areas that might be considered as coming within the field of contract law. The Commission should limit itself essentially to making drafting improvements.

25. **Ms. BOSS** (United States of America), on the question of the relationship between article 11 and contract law in general, pointed out that not all data messages led to the creation of contracts. Article 11 was applicable far beyond the bounds of contract law. However, every effort had been made to avoid conflict between the Model Law and contract law.

26. A question had been raised regarding the possibility for a purported originator to deny a message under paragraph (4) (a). She wished to point out that article 11 (1) made it clear that a data message was that of the originator if it was sent by the originator, implying that, once sent, the originator could not disown it. Paragraph (4) did not affect paragraph (1) or paragraph (2). Thus, if an originator, or his agent, sent a message, no disavowal was possible under article 11. Disavowal was limited to the situation provided for under paragraph (3), which in that regard was unique.

27. A further question had been whether the three types of error listed, relating respectively to the originator, to content, and to transmission, were in fact parallel. Where distinctions were made, it was for a good reason; thus, should it occur that one firm notified another that there had been a breach of security, and that in fact it was no longer the originator of data messages purporting to come from it, paragraph (4) (a) was crucial, since it provided that, once notification had been received, the addressee must disregard future data messages. The reason notification had been treated separately was that it related primarily to agreed security procedures, which were part of common practice in electronic commerce.

28. **Mr. UCHIDA** (Japan) said he considered paragraph (1) unnecessary, since it was already covered by the definition of "originator" in article 2. Since the text would have to be translated into Japanese, he would appreciate an explanation of the difference between "deemed" and "is entitled to regard".

29. The original text of article 11 and the new draft text presented the same difficulty, in that an addressee who had applied an agreed identification procedure could be protected even when he knew, or should have known, that the message was not from the originator. He therefore suggested that the case provided for under paragraph (3) (a) (i) of the new proposal should also be covered by paragraph (4) (b).

30. **Mr. GRANDINO RODAS** (Brazil) supported the proposed text.

31. **Ms. REMSU** (Observer for Canada) said she was concerned as to the possible impact of article 11 on third parties, who might be held liable even if they had no connection with the addressee or the originator. She suggested that in paragraph (3) (a) (i) the phrase "bearing in mind the relationship between the addressee and the originator" might be added.

32. **Mr. BONELL** (Italy) said it had not been his intention to reopen the debate on basic issues: he had simply been concerned to ensure that the Commission was clear as to the meaning of provisions before adopting them. As he saw it, the proposed new text was fundamentally different from the original article 11, which had come within the framework of contract law in that an addressee could challenge the authenticity of a message only if he was in a position to discover the error. The original text of article 11 made no provision for the originator to notify an error, and thereby nullify his original message. In addition, the proposed paragraph (6) provided that paragraph (5) should not apply "at any time" in the circumstances set out. He wondered why that was proposed, and whether the Commission was aware of the implications of the new provision for telegrams, telexes and faxes.

33. **The CHAIRMAN** said the Italian representative's concern might perhaps be met if, when the Commission came to consider the definition of a data message, it excluded telexes or telegrams transmitted via the postal services.

34. **Mr. ABASCAL ZAMORA** (Mexico) supported the Japanese proposal that paragraph (4) (b) should be extended to cover paragraph (3) (a) (i).

35. **Mr. ALLEN** (United Kingdom), referring to the representative of Italy's argument that the notice mentioned under paragraph (4) could nullify the right of the addressee to rely retrospectively on a data message, said that that was not the authors' intention, nor was it, he thought, the effect of the language. The words "at any time when" had been deliberately chosen rather than words such as "in a case where". The intended purport was that the addressee's entitlement to rely on the data message as being that of the originator would cease on receipt of the notice but that his entitlement to rely on it up to that point would be unaffected. Paragraphs (4) and (6) referred back to previous paragraphs entitling the addressee to rely on the message up to the point in question.

36. In response to the suggestion by the representatives of Japan and Mexico that paragraph (4) (b) should apply to the circumstances referred to in paragraph (3) (a) (i), he said that such a provision seemed unnecessary inasmuch as paragraph (4) (b) would not be applicable if the addressee had properly applied an agreed procedure, thus exercising reasonable care.

37. As to why paragraph (1) had been separated from paragraph (2) and the word "deemed" changed to "is", it was felt that "deemed" did not make sense in the case of a data message actually communicated by the originator. Paragraph (1) could perhaps be deleted but it seemed to have some value as a definition of what was meant by a data message being that of the originator.

38. He felt that the suggestion of the representative of Spain to insert the words "unless the addressee proves the contrary" in paragraph (4) (a) was unnecessary because, if the addressee could prove independently that the data message was that of the originator, the case would fall under paragraph (1).

(*Mr. Allen, United Kingdom*)

39. Paragraph (3) (a) (ii) had been included in deference to what appeared to be the desire of the Working Group. He felt that the flexibility embodied in the words "reasonable in the circumstances" might well be sufficient to justify the retention of the subparagraph. However, an alternative would be to have a new paragraph dealing with the case in question and perhaps enact a presumption to apply as between the originator and the addressee in those circumstances.

40. The difference between saying that a data message was "deemed to be that of the originator" and saying that an addressee was "entitled to regard it as that of the originator and to act on that assumption" related essentially to the time problem. In the former case, it might mean that the message was deemed for all time to be that of the originator; in the latter case, the addressee's actions were protected until such time as he received notice or should have known that the message was not that of the originator.

41. **Ms. BOSS** (United States of America) said that two crucial policy issues had been raised. The first related to the proposal by the representatives of Japan and Mexico to make paragraph (4) (b) applicable to instances in which an agreed security procedure was followed. That would amount to a policy change with respect to article 11 as approved by the Working Group and one which she viewed as quite inappropriate. Paragraph (4) (b) dealt in part with situations where an addressee should have known that a message was not that of the originator if it had applied an agreed security procedure, and paragraph (3) (a) (i) came into play only where the agreed security procedure had been used. On the other hand, the imposition of an additional standard ("knew or should have known had it exercised reasonable care") would render the security procedures negotiated by the parties meaningless.

42. The second policy issue concerned paragraph (3) (a) (ii), which provided for the application by the addressee of a security procedure that was "reasonable in the circumstances". That was a problematic provision, because if there was no agreed security procedure a "hacker", for example, might send a message purporting to come from someone else. In her view, the alternatives were either to delete paragraph (3) (a) (ii) or to deal with the situation in a separate paragraph setting out the circumstances in which an originator could overturn reliance on a data message by an addressee. The latter option would certainly require a lengthy discussion of the wording of the paragraph. She would therefore favour deleting paragraph (3) (a) (ii).

43. **Mr. UCHIDA** (Japan) said that he still felt it was reasonable to apply paragraph (4) (b) to paragraph (3) (a) (i) because, if the addressee knew that a data message was not that of the originator, it would be unfair to insist that the originator should be bound by the message. Such a consequence would be unavoidable if the text were left as it stood.

44. **Mr. AL-ZEID** (Observer for Kuwait) asked why the heading "Attribution of data messages" had been omitted from the proposed new version of article 11.

45. He suggested that the words "to act on that assumption" in paragraph (3) should be amended to read "to act accordingly".

46. The wording of paragraph (6) (b) was unclear, at least in the Arabic version, and should be revised in the interest of clarity.

47. **The CHAIRMAN** said that, if he heard no objection, he would take it that delegations wished to base the discussion on the version of article 11 contained in paper A/CN.9/XXVIII/CRP.7. The discussion would proceed on a paragraph-by-paragraph basis.

The meeting was suspended at 3.50 p.m. and resumed at 4.15 p.m.

48. **Mr. GRIFFITH** (Australia) proposed that the heading "Attribution of data messages" used in the Working Group's version of article 11 should be retained.

49. *It was so agreed.*

50. *Paragraphs (1) and (2) were adopted.*

51. **The CHAIRMAN** drew attention to paragraph (3) and asked whether delegations wished to delete paragraph (3) (a) (ii).

52. **Mr. BONELL** (Italy) said that his decision would depend on whether the scope of article 2 (a) of the draft Model Law remained unchanged. If it still covered such means of communication as telegrams and telexes, paragraph (3) (a) (ii) of article 11 would have to be retained, as there was no previously agreed procedure for dealing with those two means.

53. **The CHAIRMAN** said that for the time being the assumption was that article 2 (a) remained unchanged. An amendment thereto could subsequently be proposed.

54. **Mr. ABASCAL ZAMORA** (Mexico) observed that the content of paragraph (3) (a) (ii) had been approved by the Working Group.

55. **The CHAIRMAN**, after inviting delegations to indicate their attitude, noted that there was insufficient support for the deletion of paragraph (3) (a) (ii).

56. *Paragraph (3) was adopted.*

57. **The CHAIRMAN** invited comments on paragraph (4).

58. **Mr. ANDERSEN** (Observer for Denmark) asked for clarification of the words "reasonable notice" in paragraph (4) (a). Could such notice be given at any time? If that were the case, the subparagraph implied the existence of a *negotium claudicans*, an agreement that was binding on one party but not on the other.

59. **Mr. MADRID** (Spain) said that, in the light of the explanation given by the representative of the United Kingdom, he was withdrawing his proposal to add the words "unless the addressee proves the contrary" to paragraph (4) (a). However, he felt that some clarification of what was a very complex provision should be included in the Guide. The United Kingdom representative had also explained that the addressee would be entitled to act on the assumption that a data message was that of the originator until such time as the originator had given notice to the contrary. That clarification might also be included in the Guide.

60. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that, at least in the Arabic version, it was important that the notion of time should be incorporated in the expression "reasonable notice".

61. **Ms. BOSS** (United States of America) said there were two aspects to the notion of reasonable time embodied in paragraph (4) (a). First, as the United Kingdom representative had pointed out, notice had to reach the addressee before the latter relied on the message, otherwise it would be ineffective. Secondly, in many cases where EDI was used, computers were programmed to respond to a data message immediately it was received. Where a message had been transmitted in breach of the originator's security system, a telephone call made by the originator to the addressee to warn the latter of the fact might not — assuming the addressee to be a large company whose switchboard had to pass the call on to a member of its staff — reach the appropriate person in time for the addressee's system to be shut down or reprogrammed. For that reason, trading partner agreements involving the use of EDI invariably provided that the originator should give the addressee notice of a spurious message in sufficient time for the latter to alter its programmes. That situation might be catered for in the text of paragraph (4) (a) by the use of the expression "timely notice", "sufficient notice" or "sufficient and timely notice" and it should be dealt with in the Guide as well.

62. **Mr. ANDERSEN** (Observer for Denmark) said that, for him, "reasonable notice" meant "fair notice". He would prefer the text to speak of "immediate notice" or "prompt notice", so as to emphasize the temporal aspect of the situation rather than fairness.

63. **Mr. BONELL** (Italy) agreed with the United States representative that the matter should be explained in the Guide.

64. **Mr. GRIFFITH** (Australia) endorsed the comment made by the Danish representative. He suggested that the expression "reasonable notice" should be replaced by "reasonable and prompt notice".

65. **Mr. ALLEN** (United Kingdom) opposed the suggestion to use a word such as "prompt" or "timely", because the originator might be unaware that a message purporting to be its own had been sent to the addressee. The relevant time was that which elapsed after receipt of notice by the addressee.

66. **Mr. SCHNEIDER** (Germany) said that the originator could not be expected to give the addressee notice of a spurious message unless and until it knew that such a message had been sent. His delegation favoured the use of the words "prompt notice".

67. **Mr. CHOUKRI SBAI** (Observer for Morocco) proposed the deletion of the word "reasonable".

68. **Ms. BOSS** (United States of America) said that her delegation believed that by and large the Commission understood "reasonable notice" to mean notice given in time sufficient to allow the addressee to act. She therefore proposed the deletion of the word "reasonable" and the insertion, at the end of paragraph (4) (a), of the words ", in time sufficient to allow the addressee to act" after the words "of the originator".

69. **Mr. BONELL** (Italy) said that he found the language of the suggested insertion unsuitable for a statutory text. The matter should be dealt with in the Guide.

70. **Mr. ABASCAL ZAMORA** (Mexico) welcomed the United States proposal. It had the advantage of being couched in language which occurred in the Model Law on International Credit Transfers in regard to notice of revocation of a payment order.

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71. **The CHAIRMAN** said that, if he heard no further objection, he would take it that the Commission approved paragraph (4) (a) of the three-nation proposal (A/CN.9/XXVIII/CRP.7) as amended by the United States.

72. *It was so agreed.*

73. **The CHAIRMAN** invited comments on paragraph (4) (b).

74. **Mr. MADRID** (Spain) recommended a careful scrutiny of the text from the drafting aspect.

75. **The CHAIRMAN** drew the Commission's attention to the proposal made by Japan, that the scope of paragraph (4) (b) should be extended to cover paragraph (3) (a) (i). After inviting delegations to indicate their attitude, he noted that there was no broad support for that proposal and therefore took it that the Commission approved paragraph (4) (b) as it appeared in document A/CN.9/XXVIII/CRP.7.

76. *It was so agreed.*

77. *Paragraph (4) as a whole was approved.*

78. **The CHAIRMAN** said that paragraph (5) seemed to be acceptable. He invited comments on paragraph (6).

79. **Mr. BONELL** (Italy) said that, bearing in mind the qualification relating to time for notice which the Commission had included in paragraph (4) (a), it would be logical to insert a similar qualification in paragraph (6). However, his delegation would prefer instead to delete the words "at any time" from the introductory wording, as well as the words "has been notified by the originator or" in subparagraph (a); and then to combine the two subparagraphs to read: "knew or should have known that there were any errors in the process of transmission, had it exercised reasonable care or used any agreed procedure to ascertain the presence of any errors in transmission".

80. **Mr. ANDERSEN** (Observer for Denmark) said that the text should make clear the need for prompt notice. He therefore suggested either that the words "immediately after receipt of the data message" should be inserted in paragraph (6) (a) after the word "transmission", or that the paragraph should be modified along the lines of the wording approved for paragraph (4) (a).

81. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that the words "at any time" did not appear in the French version of the three-nation proposal and perhaps had no substantive import.

82. **Ms. BOSS** (United States of America) said that she could not speak for the other sponsors of the three-nation proposal, but that her delegation would not object to the changes suggested by the representative of Italy. The question of notice was less important in relation to paragraph (6) than it had been in paragraph (4), and in any case the idea of notice was subsumed in the words "knew or should have known that there were any errors"; moreover, the text proposed by Italy would be consistent with paragraph (7). If the Italian proposal was adopted, the words "at any time" should be removed from paragraph (4) (b) as well.

83. **Mr. ALLEN** (United Kingdom) said that the words "at any time" had been included in paragraph (6) because it was important to make clear that paragraph (5) would cease to apply only from the time when the addressee was notified of the error or knew or should have known of it. An alternative way of dealing with the point would be for the text to say "after the addressee has been notified or it has or should have come to his knowledge that there were any errors".

The meeting rose at 5.05 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-eighth session

SUMMARY RECORD OF THE 571st MEETING

Held at the Vienna International Centre, Vienna,
on Thursday, 18 May 1995, at 9.30 a.m.

Chairman: Mr. GOH (Singapore)

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Electronic data interchange: draft Model Law (*continued*)

Article 11 (*continued*)

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within one week of the date of distribution of this document* to the Secretary of the Commission, room E0455, Vienna International Centre.

Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

V.95 59244 (E) (a:\1995\uncitral 2)

Distr.: 23 November 1995

The meeting was called to order at 9.40 a.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW *(continued)* (A/CN.9/406, A/CN.9/407, A/CN.9/409 and Add.1-4; A/CN.9/XXVIII/CRP.6, A/CN.XXVIII/CRP.7)

Article 11 (*continued*)

1. **The CHAIRMAN** reminded participants that, with respect to article 11, paragraph (6), in the version to be found in document A/CN.9/XXVIII/CRP.7, there had been a suggestion that the words "at any time" in the chapeau be deleted and another proposal that the paragraph be amended to read "Paragraph (5) shall not apply when the addressee knew that there were any errors in the process of transmission immediately after receipt of the data message".

2. **Mr. ALLEN** (United Kingdom) said that the representatives of Australia and the United States of America had joined him in trying to find a form of words that would obviate the need for the phrase "at any time", about which certain representatives had expressed concern. The purpose of the paragraph was to make clear that the addressee could rely on the data message up to the time of notification or knowledge, but not thereafter. They proposed the following text for paragraph (6): "The addressee is not so entitled when it knows or should know, by exercising reasonable care or using any agreed procedure, that the transmission resulted in any error in the content of the data message as received". That wording was intended to replace the whole of the existing paragraph (6). Similar amendments would be needed to paragraphs (4) (b) and (7). For paragraph (4) (b) he suggested the following wording: "In a case within paragraph (3) (a) (ii) or (3) (b), when the addressee knows or should know, by exercising reasonable care or using any agreed procedure, that the data message is not that of the originator". A corresponding formulation would be needed for paragraph (7).

3. **The CHAIRMAN** asked what the words "not so entitled" referred to in the new wording for paragraph (6).

4. **Mr. BONELL** (Italy) said that the new text, which his delegation had helped to prepare, was intended to form a second sentence of paragraph (5) rather than a separate paragraph.

5. **Mr. CHOUKRI SBAI** (Observer for Morocco) observed, firstly, that the former wording of paragraph (6) provided that "paragraph (5) shall not apply ...", a reference that had been deleted in the new text. He asked whether it was intended to eliminate paragraph (5). Secondly, paragraph (6) (a) raised an important point regarding notification by the originator of an error in transmission, a point which appeared to be absent from the new text.

6. **Mr. RENGER** (Germany) noted that the United Kingdom's amendment to paragraph (4) (b) referred to paragraph (3) (a) (ii). However, it was his impression that no decision had yet been taken in regard to paragraph (3) (a) (ii).

7. **The CHAIRMAN** said that it had been decided at the previous meeting to retain paragraph (3) (a) (ii) because there had not been enough support for its deletion.

8. **Mr. RENGER** (Germany) said that that had not been his understanding. There had been a split in opinion, and it had been his understanding that the final decision in regard to paragraph (3) (a) (ii) had been deferred. He agreed with the observations made on the subject by the representative of the United States. The paragraph in question was the most revolutionary in the entire Model Law and needed to be further discussed. His country was deeply concerned about the paragraph, which had nothing to do with EDI and modified the basic principles of German contract law.

9. **The CHAIRMAN** said that, although his own notes showed that a decision had in fact been taken on paragraph (3) (a) (ii), it would be possible, after consideration of article 11 and the definitions in article 2, to reconsider the decision in respect of paragraph (3) (a) (ii).

10. **Mr. BONELL** (Italy) said that he had understood that it would be possible to reverse the decision on paragraph (3) (a) (ii) in the light of any new decision regarding the scope of the Model Law. It would therefore be necessary to return to that subparagraph after "data message" had been defined in article 2. As far as the suggested amendments to paragraphs (4) (b), (5), (6) and (7) were concerned, the new language was not intended as a substantive change. The new wording for paragraphs (5) and (7) was simply to bring them more into line with paragraph (4) (b). Paragraph (5) would have two sentences instead of only one as at present and paragraph (6) would disappear. The reference to notification by the originator would be deleted, firstly, because there was no reason why the originator should be able to give such notification "at any time", when paragraph (4) was much more restrictive, and secondly, because it was preferable to adopt uniform criteria for the three situations covered by paragraphs (4) (b), (5) and (7), in conformity with the Convention on the International Sale of Goods and certain other instruments that dealt with problems such as errors in transmission.

11. **Mr. BURMAN** (United States of America) agreed with the representative of Italy that the same approach should be taken in the three provisions. He would not want the text to inadvertently give the impression that a difference in treatment was intended.

12. **Mr. ALLEN** (United Kingdom) proposed the following text for paragraph (7): "The addressee may regard each data message received as a separate data message and may act on that assumption unless it repeats the content of another data message and the addressee knows or should know, by exercising reasonable care or using any agreed procedure, that the repetition was a duplication, and not the transmission of a separate data message."

13. **Mr. PELICHET** (Observer for The Hague Conference on Private International Law), referring to article 11, paragraph (8), in document A/CN.9/XXVIII/CRP.7, said that the last five words of that paragraph, "and any other applicable law", caused a major problem for his organization. The Model Law would apply when in a conflict of law the ruling of the judge designated a State that had incorporated the Law into its national system. But that system would then be fully applicable. There could be no question of "other applicable laws". In his view, the last five words should be deleted. Indeed, he thought that paragraph (8) as a whole was superfluous.

14. **Mr. BONELL** (Italy) agreed with the previous speaker. There were other potential problems. If, for example, a State were to make use of the second footnote at the very beginning of the Model Law and limit its application to data messages relating to international commerce, the question might arise as to what law was applicable and whether States might not wish to include special conflict-of-law rules, one of which might be implicitly envisaged in paragraph (8). If the Commission wished to explore that question, it should perhaps do so in a footnote. Attention would then also have to be paid to article 3, paragraph (2), which requested judges and arbitrators to try to solve problems not settled by the Model Law itself by applying the general principles on which it was based before resorting to another law in the same legal system or to a foreign law. That was a complicated area which, in his view, the Commission should not enter. It would be preferable to delete paragraph (8) altogether.

15. **Mr. ABASCAL ZAMORA** (Mexico), referring to the policy position underlying paragraph (8), said that when the Model Law had been drafted, it had been decided to produce a law that would be limited to regulating data messages and associated problems. It had subsequently been realized that the Model Law would need a provision setting out the conditions under which a data message could be considered as issued by the originator so that the addressee would be able to consider it as having the value of a signed document. The Model Law did not deal with the legal effect that such a message might have in the context of the law of obligations and contracts. It was possible that it might be necessary to adjust the wording in order to bring out the original intention and avoid unwanted interpretations.

16. **Mr. BURMAN** (United States of America) agreed with the representative of Mexico as to the reasons for the inclusion of paragraph (8). He did not consider any further amendments necessary and disagreed with the representative of Italy and the observer for the Hague Conference, who were raising problems of conflict of law with which the Law was not directly concerned. He saw no inconsistency with article 3 or with the second footnote. Paragraph (8) served its purpose and was appropriate.

17. **Mr. CHOUKRI SBAI** (Observer for Morocco) endorsed the point made by the observer for the Hague Conference. He proposed that paragraph (8) should be reworded as follows: "Any further legal effect of the data message shall be determined in accordance with the provisions of this Law and any other general rule or standard".

18. **Mr. VRELLIS** (Observer for Greece) also supported the point made by the observer for the Hague Conference. Paragraph (8) solved no problems, was hard to interpret and could be deleted without difficulty. Moreover, it would be difficult to deal with the question of conflict of law at the present stage of the Commission's deliberations, even in a footnote, since it was a difficult subject and would involve lengthy discussion.

19. **Mr. RENGER** (Germany) asked whether the words "may regard" in the text proposed by the United Kingdom representative for paragraph (7) could be interpreted as meaning that the addressee had a choice.

20. **Mr. ALLEN** (United Kingdom) explained that the meaning was that "the addressee is entitled to regard", and suggested that that wording should be adopted.

21. **Mr. SORIEUL** (Secretariat) explained that paragraph (8) had been included merely to reaffirm that the purpose of the Model Law was to deal with the transmission of information in the form of a data message, and not with the substance of a contract or order contained in that message, which might be covered by contract law or other provisions of commercial law.

22. **Mr. ALLEN** (United Kingdom) agreed with the observer for the Hague Conference and the representative of Italy that paragraph (8) could be deleted. It was unnecessary and confusing, since it implied that article 11 was intended to deal with the legal effect of a data message, whereas it was not. The data message might have no legal effect at all and might simply be an enquiry about goods. The sole purpose of article 11 was to decide the circumstances in which a message was directed to the originator and the circumstances in which the addressee could safely rely on that assumption.

23. **Mr. SHIMIZU** (Japan) agreed that paragraph (8) had been included to make it clear that article 11 was not intended to interfere with the laws of contract or agency. However, his impression was that the text adopted the previous day had the effect of doing so when it applied to the contractual relationship between originator and addressee. It might be helpful to make it clear in the Guide that although article 11 was not intended to interfere with the law of agency or the law of contract, it might have such an effect in certain jurisdictions.

24. **Mr. MADRID** (Spain) said that article 11 was solely concerned with establishing the fact of a link between the originator of a message and the addressee. It did not deal with the legal consequences of any message that might pass between them. That would be determined by the relevant legal system. His delegation was therefore in favour of maintaining paragraph (8) to make that point clear, but of redrafting it to avoid any erroneous interpretation that it might be concerned with a conflict of law. In that connection, he drew attention to paragraph 131 of document A/CN.9/406, which recorded the discussion in the Working Group that had led to the adoption of the paragraph.

25. **Ms. ZHANG Yuejiao** (China) endorsed the explanations given by the Secretariat and considered that articles 3 and 11 should be maintained. To ensure uniform implementation of the Model Law, the Guide should contain an explanation of article 3 (2) and of the words "any other applicable law" in article 11 (8).

26. **Mr. CAPRIOLI** (France) was in favour either of deleting article 11 (8) altogether or of deleting from it the words "any other applicable law".

27. **Mr. BONELL** (Italy) said he was grateful for the explanation of the rationale behind article 11 (8), but considered that it had not been conveyed in the wording. According to paragraph 131 of document A/CN.9/406, the Working Group had approved and referred to the drafting group language along the following lines: "Once a data record is deemed or presumed to be that of the originator, any further legal effect will be determined by this law and other appropriate laws". That was a much clearer formulation.

28. If it was quite certain that the Model Law did not affect general rules of agency and contract law, he suggested that that should be made clear at the outset in the following terms: "Nothing in this Law shall affect ...".

29. **Mr. FARIDI ARAGHI** (Islamic Republic of Iran) considered that the last phrase of paragraph (8) was ambiguous and that the rest of the paragraph repeated the provisions of article 3 (2). It should be deleted.

30. **Mr. MAHASARANOND** (Thailand) agreed that paragraph (8) should be deleted, because it caused confusion. In any case, legal recognition of data messages was already dealt with in article 4.

31. **Mr. ALLEN** (United Kingdom) said that his delegation would prefer to delete paragraph (8) altogether, but if the Commission did wish to maintain it, he suggested that it should be redrafted as follows: "This article does not determine whether the data message has any legal effect, except in so far as may result from the attribution of the data message to the originator"

32. **Mr. BURMAN** (United States of America) considered that either that wording or the original formulation agreed by the Working Group would accomplish the same result.

33. **Mr. BOSSA** (Uganda) said that paragraph (8), which seemed to be trying to relate the Model Law to domestic law, should either be deleted or transferred to article 1.

34. **Mr. SZURSKI** (Poland) was in favour of deleting paragraph (8).

35. **Mr. RENGER** (Germany) also wished to delete paragraph (8) and considered that rules of international interpretation should be included in the Guide, not in the Law itself.

36. **Mr. CHOUKRI SBAI** (Observer for Morocco) said he could not support the wording just suggested by the United Kingdom and would prefer to delete paragraph (8).

37. **Mr. ABASCAL ZAMORA** (Mexico) said that although he had tried to explain why paragraph (8) had been adopted by the Working Group, he too would have no problems in deleting it.

38. **Mr. UCHIDA** (Japan) was in favour of deleting paragraph (8), in order to avoid any confusion.

39. **Mr. BURMAN** (United States of America) said that his delegation too had no objection to deleting the paragraph.

40. **Mr. BONELL** (Italy) said that, even if paragraph (8) was deleted, article 11 could still contain a provision on the lines of the earlier draft text.

41. **Mr. VRELLIS** (Observer for Greece) said that other effects of the data message not specifically provided for could also be governed by the Model Law.

42. **Mr. ABASCAL ZAMORA** (Mexico) said that two further aspects that might be of relevance were contained in articles 12 and 13 and involved the expression of intent by electronic means.

43. **The CHAIRMAN**, summing up the debate, said that there appeared to be general agreement that the new paragraph (8) should be neither retained nor replaced.

44. *It was so decided.*

45. **The CHAIRMAN** invited the Commission to return to its consideration of the proposed revised wording to replace paragraphs (5), (6) and (7), the text of which was as follows:

"(5) (a) Where a data message is that of the originator or is deemed to be that of the originator, or the addressee is entitled to act on that assumption, then, as between the originator and the addressee, the addressee is entitled to regard the content of the data message as received as being what the originator intended to transmit, and to act on that assumption.

"(b) The addressee is not so entitled when it knows or should know by exercising reasonable care or using any agreed procedure that the transmission resulted in any error in the content of the data message as received.

"(6) The addressee is entitled to regard each data message received as a separate data message and to act on that assumption unless it repeats the content of another data message and the addressee knows or should know by exercising reasonable care or using any agreed procedure that the repetition was a duplication and not the transmission of a separate data message."

46. **Ms. ZHANG Yuejiao** (China) said that the replacement of "knew" and "should have known" by "knows" and "should know" in paragraph (5) (b) could imply that the addressee might act on the assumption that the data message was that of the originator before becoming aware of an error or duplication and would then be solely responsible. That would not be fair.

47. **Mr. ALLEN** (United Kingdom) said that the use of the present tense in the revised wording was intended to make it clear that the addressee was entitled to rely on the data message until it became known to him that the message was not that of the originator, but not once he had such knowledge.

48. **Mr. SZURSKI** (Poland) said that he questioned the need for new paragraph (6), which defined what was regarded as a separate message. If such a provision was necessary, it would be better to say that the addressee was entitled to regard a duplication of a data message as a separate message.

49. **Mr. SHIMIZU** (Japan) noted that the words "as between the originator and the addressee" in paragraph (5) of the text in document A/CN.9/XXVIII/CRP.7 did not appear in paragraph (6) of the revised text. Did that have any significance?

50. **Mr. CHAY** (Singapore) wondered whether the time element in paragraph (5) (b) could be expressed more clearly by replacing the words "The addressee is not so entitled" by "The addressee shall cease to be so entitled".

51. **Mr. RENGER** (Germany) said that his delegation could go along with new paragraph (5) if paragraph (3) (a) (ii) was deleted.

52. **The CHAIRMAN** said that he took it that the Commission wished to adopt the revised text of paragraph (5) on the understanding that it would re-examine paragraph (3) (a) at a later stage.

53. *It was so decided.*

54. **Mr. RENGER** (Germany), referring to new paragraph (6), said that, whereas the text as previously drafted had constituted a rule of evidence and provided for a presumption on the part of the addressee, the revised text gave a right to the addressee. He would like to know the reason for such a major change of policy. In new paragraph (6) it would be preferable to say that the addressee "has to regard" each data message received as a separate data message.

55. **Mr. ALLEN** (United Kingdom) said that the phrase "is entitled to regard" had been used in new paragraph (6) for reasons of consistency with the rest of article 11. The revised text of the article attempted to reflect the Working Group's intention of delimiting the extent of the protection afforded to the addressee rather than enact an evidential presumption. At the time of drafting of the earlier text, the question whether the presumption should be rebuttable or not had not been settled, the word "deemed" having been left in square brackets. If it was a rebuttable presumption and the presumption was rebutted, the addressee would no longer have protection and would be exposed to claims from the originator as from receipt of the message, and even before the addressee had had knowledge that the message was not that of the originator. In the case of a non-rebuttable presumption, the addressee would be afforded protection for all time, and even after having had such knowledge. The Working Group's intention was that protection should cease upon such knowledge being acquired, and the revised wording thus provided for such a cut-off point.

56. **Mr. MADRID** (Spain) said that, as he understood it, paragraph (3) (a) (i) had been adopted in the belief that it provided for a presumption and not a right, since the message was assumed to be that of the originator and the addressee had applied a previously agreed procedure. If, however, as had been explained by the representative of the United Kingdom, the phrase "is entitled to regard" in paragraph (6) had been employed for reasons of uniformity of language between paragraphs, that same phrase should not appear in paragraph (3), whose substance was different.

57. **Mr. SZURSKI** (Poland) said that his delegation felt that new paragraph (6) should be deleted, since it could give rise to complications. Indeed, it would be possible in practice for a second message to be a duplication even if one word of its content had changed. In his view, the determination of such matters should not come within the purview of the Model Law.

58. **Mr. BURMAN** (United States of America) said that he believed that the Working Group had agreed that, since the purpose of the Model Law was to facilitate electronic commerce through the use of new technologies, its provisions should deal with some of the common problems encountered in that environment, and hence with the question of erroneous duplication of messages, in order to provide guidance for users.

59. **Mr. SORIEUL** (Secretariat), replying to the issue raised by the representative of Poland, said that the question of duplication did in fact arise in practice. The Working Group had agreed that the issue should be dealt with, but had never felt that the application of a procedure for avoiding the duplication of messages in any way affected the content of the message. The procedures usually applied enabled a distinction to be made between the case when the repetition of a message was simply the result of error and should therefore be considered as null, and the case when there was in fact a second message.

60. **Mr. AL-NASSER** (Saudi Arabia) suggested that paragraph (6) might read: "When the addressee receives a data message, it is entitled to act on the assumption that it is a separate data message, unless the message repeats the content of an earlier data message and the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was a duplication of an earlier data message."

61. **Mr. GRIFFITH** (Australia) proposed referring to "erroneous" duplication, as had been done in paragraph (4) of article 11 in the report of the Working Group (A/CN.9/406).

62. **Mr. RENGER** (Germany) said that he doubted whether the rule was convincing. He cited an example: when a bank received a payment order followed by a duplicate for the same amount and payee, if paragraph (6) were applied, so that the addressee was entitled to regard each data message as a separate payment order, the payee would receive payment twice. He wondered whether it was really a good policy to allow banks the possibility of making the second payment in such cases. As a rule of evidence, the original text had already been a compromise, because if there was duplication, the result should not be a rule of evidence; instead, the addressee should be entitled to damages if the duplicate message caused it damage. The Working Group's proposal had been not to regard the second erroneous message as a separate one — which would mean, in his example, that while nothing could be done if the duplicate payment order had been fulfilled, if it had not, there would be no damage because it could be stopped. What the new paragraph (6) proposed was not a rule of evidence, but a rule of substance, and as such it was not convincing. The policy of the rule should be that where there was duplication of a message, the addressee would be entitled to damages caused by such duplication, and that policy was very different from what had been discussed hitherto.

63. **Mr. ABASCAL ZAMORA** (Mexico) said that paragraph (7) in document A/CN.9/XXVIII/CRP.7 did not differ in substance from the Working Group's proposals. Paragraph (4) of article 11 as submitted to the Commission also referred to the detection of duplicates. The same issue had arisen in the Model Law on International Credit Transfers, where the problem of verifying whether the message came from the originator had been resolved. As a separate matter, it had been deemed necessary in article 5 of that Model Law to establish a procedure for verifying the contents of the message, in which duplication was a frequently encountered error.

64. The proposal for a redrafted article 11 was intended to identify more clearly those two issues, the substance of which could be combined. If there was an error, and if the addressee was able to detect it through procedures of verification, then the addressee was not entitled to act on the message in question.

65. **Mr. MADRID** (Spain) asked how an erroneous duplication could be detected. That could never be done solely on the basis of the contents of the message, because there might be a case of two identical orders that were both genuine. Perhaps it was the identification of the message and not the contents, which should be stressed.

66. **Mr. ALLEN** (United Kingdom) agreed with the representative of Germany that the question at issue was one of policy, not of drafting. The text embodied the policy of the Working Group, but the Commission could still change that policy. The issue was where the risk should be allocated when two identical messages were sent — who should properly incur the loss. The Commission was not at present discussing cases where there was doubt as to the source of the message, which was dealt with quite separately, but, rather, cases of duplication where both data messages were known to be those of the originator, or where the addressee was entitled to assume they were. In such instances, the addressee might incur a loss, by virtue of the fact that two messages in identical form had been sent. The addressee might, for example, act on an order for goods and dispatch them to a third party, and if the originator was then entitled to resile from the second order, the addressee would incur a loss.

(*Mr. Allen, United Kingdom*)

67. Given that both messages came from the originator, it was in the originator's power to set the matter right, which was why the draft gave the protection to the addressee that it did. If two messages were sent, it was up to the originator to alert the addressee to the fact that the second message should not be relied upon. Unless the originator did so, the addressee should be entitled to rely on the second message unless it had failed to use an agreed procedure or had been negligent in assuming that the second message was not a mere duplication. The Commission should not be concerned only with erroneous messages, since a second message might be sent in the belief that the first had not been received. The Commission ought to consider the position of the addressee in those circumstances as well: should it be allowed to rely on the second message, or should it have no protection when it received a second message which appeared to be identical to the first?

68. **Mr. RENGER** (Germany) said that the first problem was where the risk should be allocated; the risk of an erroneous duplication lay with the originator. The second problem was what the consequences should be. One option would be to say that the addressee might be allowed to profit from others' errors — for example, to fulfil the second payment order or enter into a second sales contract. As far as credit transfers were concerned, there was the possibility of a revocation. In some legal systems, the originator could revoke a payment order; discussion was at present under way in the European Union as to whether revocation should be excluded or not. The risks should lie with the originator, but only in limited circumstances: it should only pay damages, and the addressee should not make a profit from the situation. As now drafted, the rule left the matter up to the addressee, which was entitled to regard each data message as a separate one. That was not fair, as it was biased in favour of the addressee. For that reason, he opposed the new text.

69. **Mr. BONELL** (Italy) asked whether the representative of Germany considered there was a difference in substance between a so-called duplicate situation and a message which was erroneous in content. The Working Group had gone on the assumption that the two situations should be treated in the same manner; paragraph (4) of article 11 addressed them both. He wondered why the representative of Germany was raising the problem of duplication with respect to new paragraph (6) and had not felt it necessary to do so with respect to paragraph (5).

70. **Mr. ABASCAL ZAMORA** (Mexico) said that the Model Law on International Credit Transfers, unlike the present Model Law, regulated the rights and obligations of the parties with respect to payment orders. It had been established as a general rule in the earlier Model Law that such orders were irrevocable unless revocation was received in sufficient time to be able to act on it. In paragraph 130 of its report, the Working Group had considered whether a similar provision should appear in the present Model Law with respect to revocation of erroneously duplicated messages. The Group had felt that the originator of a duplicate message had the opportunity of sending a separate message to revoke the erroneous message, but that it was not necessary to say so.

71. **Mr. RENGER** (Germany) said that that situation needed to be dealt with, as it caused major problems in banking practice and in industry, with banks frequently receiving erroneous duplicate payment orders. As far as the error in content was concerned, in his country it would be dealt with in domestic law, through the general rule of contracts. There were rules on error which could be applied, or the problem could be easily solved by applying additional rules of error, but such additional rules could not really apply to the second situation of duplication. That was why his delegation was concerned, from its domestic point of view, with the duplication problem. It was a general principle of law in various legal systems that an addressee should

(*Mr. Renger, Germany*)

never profit from errors made by the originator or other parties; on the other hand, if damage was caused, the addressee should be entitled to damages.

72. **Mr. BURMAN** (United States of America) said that his delegation continued to support the explanation given by the United Kingdom concerning the proposed language. He was uncomfortable with references to banking law and electronic fund transfers, which were dealt with in the Model Law on International Credit Transfers, because the particular area of EDI use in banking was highly regulated, with a very high degree of assurance owing to reliability of security systems, and it represented a quite different model from general commercial uses. Accordingly, the Commission should focus on examples that occurred in other sectors of commerce.

73. **Mr. GRIFFITH** (Australia) said that he agreed there was an underlying issue of policy with regard to paragraph (4) of article 11. It was fairly clear that the policy which had been accepted by the Working Group was that the addressee should not be permitted to rely on plainly erroneous information where there was a plainly erroneous duplication. It was a matter of wording; perhaps the original wording of paragraph (4) should be retained.

The meeting rose at 12.30 p.m.